80-882

Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

EDLER INDUSTRIES INCORPORATED, a corporation, VERNON EDLER, an individual,
Petitioner

vs.

UNITED STATES OF AMERICA
Respondents

PETITION FOR WRIT CERTIORARI TO THE UNITED CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI
ISSUES PRESENTED

At issue herein, is the extent to which the government can restrict the transfer of technology and know how of unclassified information without interfering with the First Amendment right to free speech in a a commercial context.

The Appellants were charged with and convicted of unlawfully transmitting from the United States to the Republic of France technical data and technical assistance relating to an article under The United States Munitions List in violation of 22 U.S.C. § 1934 (c).

Appellants concede that the government possesses the power to regulate the international arms traffic and that the President has the authority to act in this respect. The power to control international arms

traffic also includes the power to control the dissemination of information directly related to the production and use of arms.

A person may transmit technology on matters relating to the Munitions List provided that said persons have prior approval of the Department of State.

Appellants contend that the technology and know-how they transferred as aforestated does not come within the purview of the Munitions Act and therefore does not require prior Department of State approval.

Further, Appellants contend that the licensing requirements and the application and interpretation of the statute by the trial courts, violated appellants' First Amendment right of free speech. Appellants contend that the licensing requirements are invalid for lack of standards to guide the licensing official. Appellants contend that

the statute as applied O.M.C. and by the trial court impinges upon free speech more than merely as an incidental restriction upon speech resulting from the legitimate regulation of conduct.

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United States v. Edler Industries

MEMORANDUM Filed July 3, 1980
(9th Circuit)

United States Constitution
First Amendment

22 U.S.C. 1934(c)

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the 9th Circuit rendered its MEMORANDUM decision and filed the same on July 3, 1980.

This court has jurisdiction under 28 U.S.C. §1254.

The case involves the following statutes and constitutional provisions;

1. 22 C.F.R. (International traffic in arms regulation) §121-128, 125.10, and 125.11.
2. 22 U.S.C. §1934 (now §2778)
3. United States Constitution First Amendment.

STATEMENT OF FACTS

Appellants' Edler Industries, Incorporated and its President, Vernon Edler, as pertinent herein, are a contract manufacturer of materials primarily serving the aerospace industry.

In January 1974, the appellants reached an agreement with a French firm, S.E.P., to provide technical assistance relating to light weight materials and again in 1974 an agreement with S.E.P. to provide technical assistance relating to carbon/carbon materials.

Appellants' and its personnel knew that the French firm was engaged in the manufacture of missile engine components for aerospace uses.

In approximately 1950, Edler Industries, Incorporated began in Newport Beach, California as a small machine shop and gradually

evolved into a contract manufacturer primarily serving the aerospace industry. The corporation remained small, as a result, Vernon Edler, its founder and president, not only guided its business affairs, but had frequent contact with its employees.

Prior to 1968, the corporation acquired an expertise in tape wrapping, a process for producing durable light weight materials into a solid object of any configuration by wrapping specially impregnated cloth on a mandral and then subjecting the wrapped material to further impregnation with other agents and curing under pressure and temperature.

Subsequently, the corporation also developed the capacity to produce light weight materials, using different techniques, but still utilizing some of the tape-wrap techniques of prior years, and carbon/

carbon composites. Unquestionably, both types of materials have important aerospace applications particularly for rocket and missile engines and the portion thereof referred to as a "nozzle."

The light weight and carbon/carbon materials are valuable as ablators and insulators wearing away under pressure and heat of the missile engine exhaust at a predictable rate.

The techniques utilized by Edler Industries do not constitute classified information and they have non-military as well as military uses.

Nevertheless, the government contends that the dissemination of the technological data to include know-how required prior Department of State approval.

In both the January 1974 light weight program and the March 1974 carbon/carbon pro-

gram, Appellants filed applications for approval of their dissemination of said information; said approval being in the form of applications for a license through the Office of Munitions Control. The applications were denied in October 1974 on the basis that the exportation of this particular technological knowledge contravened the United States policy. By the time of the denial, however, the Appellants continued to fulfill their carbon/carbon agreement.

Edler personnel demonstrated to S.E.P. at Newport Beach, California, the techniques they used and produced sample pieces in configurations similar to those utilized in missile engines, but not specifically designed for any particular missile. Additionally, Edler personnel applied the same techniques to material used by S.E.P. Edler personnel also traveled to France where they

observed and critiqued the techniques employed by S.E.P. personnel.

Although charged with five separate counts of transmitting technical data and assistance to the Republic of France, the appellants' activities related to two (2) unauthorized separate technical assistance programs:

(1) Commencing on or about January 15, 1974, providing for know-how, instructions, and demonstrations of light weight phenolic preimpregnated material fabrication and;

(2) On or about March 13, 1974, providing for the design, manufacture and processing of carbon/carbon parts which included know-how, instructions, demonstrations and a quality control assurance program.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, v. EDLER INDUSTRIES, INC., et al., Defendant-Appellant.	No. 79-1140 MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: WALLACE and ALARCON, Circuit Judges and Nielsen, *District Judge

Edler Industries, Inc., and Vernon Edler (appellants) appeal a judgment of conviction, after a jury trial, of five counts of unlicensed exportation of technical data related to articles on the United States Munitions List. (22 U.S.C. § 1934 [c]; re-

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* Honorable Leland C. Nielsen, United States District Judge, Southern District of California, sitting by designation.

pealed in 1976 and replaced by 22 U.S.C. § 2278; 22 C.F.R. § 121.01). Appellants were convicted once before of these offenses but the convictions were reversed and the case was remanded for a new trial. United States vs. Edler Industries, 579 F.2d 516 (9th Cir. 1978). This appeal is from the second trial.

The heart of appellants' contentions is that the trial court interpreted the statute in the same overbroad manner that led to reversal in Edler. This interpretation, appellants contend, resulted in the improper exclusion of relevant evidence and the refusal to give appropriate jury instructions and ask necessary voir dire questions. In addition, appellants assert evidence of a prior act was admitted solely to show criminal disposition.

We conclude the rulings did not violate the holding in Edler and find the evidence of the prior act was admitted for a proper

purpose. We affirm the convictions.

BACKGROUND

In Edler the factual background and statutory scheme were set forth in detail, so a brief recount is all that is necessary now. 579 F.2d at 518-519.

In 1954 Congress authorized the President to control the export of certain war-related articles. The State Department formulated a list of restricted items and promulgated regulations that require licensing approval from the State Department before any item on the Munitions List can be exported. 22 U.S.C. § 1934 [c]; 22 C.F.R. § 121.01.

Edler Industries is an aerospace engineering firm that, in 1974, possessed technical knowledge useful in manufacturing tape wrapped materials and carbon/varbon materials. This technical data is useful for the production of rocket nozzle components.

Edler agreed to furnish a French company, Societe Europeene de Propulsion (SEP), with technical data related to tape wrapping and carbon/carbon materials. Edler applied for a license, representing to the State Department that the exportation would await approval, but in fact the exportation had already begun when the application for a license was filed. The application was denied but Edler continued the exportation and completed its performance under the agreement.

In 1968-1969 Edler had exported similar information to SEP's predecessor company, again after seeking and being denied a license. No prosecution was initiated for that transfer of data.

THE EDLER OPINION

The contentions in this appeal can be analyzed only against the backdrop of the opinion in United States v Edler Industries-Inc., supra.

Following the first conviction, appellants challenged the constitutionality of the statute and regulations, claiming they infringed appellant's First Admendment right to disseminate information. The court agreed there was at least a limited First Admendment right protecting some types of commercial speech, but also noted the legitimate national interest in restricting the flow of weapons. In order to reconcile the First Admendment with the national interest, the court held the statute would have to be construed narrowly. Because the trial court had applied the statute literally, the court reversed the convictions.

To provide guidance the court held: (1) the statute only prohibits the exportation of technical data that is "significantly and directly related to specific articles on the Munitions List." 579 F.2d 521; and (2) there is a scienter requirement. If

the data has both peaceful and military uses, there must be proof that defendant knew or had reason to know it was going to be used for military purposes.

EXCLUSION OF EVIDENCE

Appellants maintain the trial court excluded evidence of nonmilitary uses, evidence that the data was never used to produce an end item, and other evidence that would show the data was not significantly and directly related to a restricted item. If any of these claims are correct, the rulings would constitute error in light of express language in Edler. However, our review of the record disclosed no significant exclusions of limitations on appellants' evidence.

In Edler, the court specifically addressed these issues.

> "We believe evidence concerning nonmilitary applications is relevant to the question of scienter, i.e., whether a defendant knew or should have known that the recipient of the exported in-

> formation would use the information to produce or operate Munitions List articles."
>
> ". . . The District Court also refused to permit the defense to develop the proposition that the assistance given to SEP would not, of itself, suffice for the manufacture of rocket nozzle components. Any information that would in any way help in a process that led to the final product, the court stated, came under the definition of technical data. Such a reading of the statute and regulations is far too broad, as such evidence bears on the significance of the relationship between the information and Munitions List items."

579 F.2d 522.

Appellants' brief cites two occcasions that are intended to illustrate the trial court's restriction on evidence. The first instance is a question posed on cross-examination of a government expert witness, Lewis Montulli. Montulli testified that he was an officer in the Air Force, working for the Deputy Chief on Staff for Research and Development. He testified at length about rocket nozzles and the technical data that Edler Industries transferred to SEP.

On cross-examination defense counsel asked: "And the design and the information needed to make those rocket nozzles would substantially vary?" The government's objection to this question was sustained.

Appellants fail to explain how this question was relevant to an issue in dispute. Admittedly the totality of technology necessary to produce a restricted item is relevant, and Edler expressly held that appellants should be permitted to present evidence on this point. But the question defense counsel asked of Montulli was not directed to the total technoloy of a rocket nozzle. Rather, it sought to show that alternate technologies exist, and that there are different types of rocket nozzles. The trial court was well within its broad discretion in excluding this line of inquiry as irrelevant. United States v. Kearney, 560 F.2d (9th Cir. 1977); United States v

McLennan, 563 F.2d 943 (9th Cir. 1977).

Appellants also complain of the trial court's ruling that defense expert Payne could not answer a question posed to him on his direct examination. Payne was asked: "Could you describe in more detail the activities that you engaged in to obtain a rocket nozzle?" The government's objection was sustained, and now appellants claim this question was designed to show the technology Edler transferred was not significantly and directly related to a restricted item.

This contention is unpersuasive because the continuing examination of Payne developed his opinion that Edler's technology was not significantly related to making a rocket nozzle. He also described the other steps that would be necessary to transform the technology into a finished rocket nozzle. (R.T. pp. 537-541.) A review of Payne's entire testimony undermines any argument

that appellants' technology was not significantly and directly related to a Munitions List aritcle. Appellants did present testimony on the issue, but the jury apparently did not credit it.

Appellants' brief also claims the trial court refused to permit evidence that SEP never actually used the technology to produce a rocket nozzle. If such a ruling was made it would have been incorrect, but appellants fail to pinpoint any effort to present testimony on actual use by SEP. Our review of the record discloses only one question directed to this point. During cross-examination of a government witness defense counsel asked:

> Q. "Do you have any knowledge of whether or not the processes that you were taught to the French in the lightweight program in 1974 were ever used by the French as a system?"

The court sustained an objection to the question, and it does not appear appellants sought to develop this line of evidence at

other points in the trial.

When the objection was raised there was no offer of proof to show that the answer would have been favorable to appellants. Fed. R. Evid. 103(a) (2). This fact, along with the observation that appellants did not pursue the inquiry in their case, eliminates our concern about this assignment of error. Appellants are attempting to create an issue on appeal out of something they did not actually consider a viable issue during the trial.

EVIDENCE OF A PRIOR ACT

The trial court admitted evidence that in 1968-1969, almost six years before the acts charged in the indictment, appellants transferred technical data t SEP without a license. Appellants claim this evidence was admitted solely to prove criminal disposition in violation of Rule 404(b), Fed. R. Evid.

Rule 404(b) excludes evidence of other

crimes or acts where the prior act is being used solely to show criminal disposition. Where there is a legitimate purpose, such as showing "motive, opportunity, [or] knowledge," the evidence is admissible. Rule 404 (b) is often described as an "inclusionary" rule. United States v Young, 573 F.2d 1137 (9th Cir. 1978); United States v Sangrey, 586 F.2d 1312 (9th Cir. 1978).

Evidence of the 1968 transfer of data served a legitimate purpose; it was not admitted solely to prove criminal dsiposition. When Edler applied for a license in 1968 and the application was denied, the State Department explained the reason for the denial as concern that SEP would use the data to produce items for strategic delivery systems. In addition, an employee of Edler testified that he visited the SEP plant in France in connection with the 1968 program and observed items that would put Edler on notice that

SEP was producing rocket nozzle components.

Consequently, the 1968 act was relevant to proving scienter--that Edler knew or should have known that SEP would use the data to produce a restricted item. In light of this purpose the evidence was properly admitted.

EXCLUSION OF MUNITIONS CONTROL NEWSLETTER

The trial court refused to admit into evidence a Munitions Control Newsletter that was issued in 1977, three years after the acts appellants committed. The letter was intended to clarify for aerospace firms the scope of the regulations pertaining to exportation of munitions and technical data. According to the government, it was issued after several inquiries from aerospace firms. Appellants claim the letter would have shown there was confusion in 1974 as to the scope of the regulations and the makeup of Category IV of the Munitions List.

We conclude exclusion was proper. Appellants have not shown that the newsletter was an admission of confusion. Further, the letter was too remote in time to have direct relevance as to Edler's knowledge or confusion. The possible confusion of other aerospace firms was not an issue--Edler's knowledge was all that was relevant. Moreover, appellants did not present evidence of their confusion as to the scope of the regulatory scheme, nor did they attempt to show they were unaware of the licensing requirement. Such a showing would have been difficult since appellants had applied for a license and had the application denied.

Exclusion of the newsletter was not an abuse of the trial court's discretion. United States v Kearney, 560 F.2d 1358 (9th Cir. 1977); United States v McLennan, 563 F.2d 943 (9th Cir. 1977).

INADVERTENT READING OF TWO DISMISSED COUNTS

When the trial court read the indictment to the jury, it inadvertently read two counts charging the appellants with making false statements (18 U.S.C. § 1001), that had been dismissed during the first trial. When the error was noted, the court instructed the jury that those counts were not before it and that there would not be evidence presented on them. Appellants claim this slip of the tongue prejudiced the jury against them.

This inadvertent error does not require reversing the convictions. There is no reason to believe the jurors focused on the mention of these counts, and more importantly, the substance of the counts was indirectly placed before the jury when evidence of the license applications was presented. Thus we cannot perceive any prejudice resulting from the mistake.

REFUSED VOIR DIRE QUESTIONS

Appellants submitted two voir dire questions that were not asked by the court. The questions were:

> "The law requires that a person must have a license in order to export materials and technology that come within the Munitions Control Act. Could you accept the proposition that the government required a license for material and technology that did not come within the Munitions Control Act, if such evidence of that fact were produced in court during that trial?"
>
> "Could you accept the instruction of this court that the government's requiring a license for the material and technology to be exported does not determine the issue of whether said materials and information are within the Munitions Control Act, but the government has the burden of proving that said materials and technology come within the Munitions Control Act beyond a reasonable doubt?"

Trial courts are invested with broad discretion in deciding whether to ask a specific question on voir dire. Smith v United States, 431 U.S. 293 (1977); United States v Clabaugh, 589 F.2d 1019 (9th Cir. 1979). The essential inquiry is whether the voir dire

was so unreasonable as to amount to an abuse of discretion, and the conduct of vior dire will not be a ground for reversal absent such a showing.

It was not an abuse of discretion to decline the two question. Voir Dire is designed to test the potential jurors' ability to act as fair and impartial jurors. It is not intended to permit the attorneys to begin arguing the case, or presenting their respective positions, before any evidence has been presented.

Moreover, the jurors are not familiar with the technology of the case at the voir dire stage of a trial. Consequently, the trial court could well conclude that it would be a waste of time to ask potential jurors questions phrased in terms of the peculiar facts of the case. The two rejected questions were not necessary to secure a fair and impartial jury.

JURY INSTRUCTIONS

The trial court refused to give jury instructions defining "components, parts, accessories," and defining "significant and direct."

Significant and direct are words in common usage. There is no need to attempt to define common words when their meaning in the case is the usual one, and attempts to define common words are more likely to confuse the jury. Guon v United States, 285 F.2d 140 (8th Cir. 1960); United States v Maude, 481 F.2d 1062 (D.C. Cir. 1973).

The requested definition of "components: was 22 C.F.R. § 121.15, which states:

> "(d) Parts are defined as any single unassembled elements of major and minor components, accessories and attachments which are not normally subject to disassembly without destruction or impairment of design use. (Examples: Rivets, wire, bolts, etc.)"

Again, the words appellants sought to define are common ones, and it is difficult

to see how the jury would have benefited from a specific definition. The jury did not need this definition in order to understand the legal essentials and the degree of proof necessary. Consequently, we find no error in refusing to give it. United States v James, 576 F.2d 223 (9th Cir. 1978); Kramer v United States, 408 F.2d 837 (8th Cir. 1969).

The convictions are affirmed.

UNITED STATES of America, Appellee,

v.

EDLER INDUSTRIES, INCORPORATED
a corporation and Vernon Edler,
an Individual, Appellants.

No. 76-3370

United States Court of Appeals
Ninth Circuit

July 31, 1978

James L. McDonald (argued), of Hunt, Liljestrom & Wentworth, Santa Ana, California, for appellants.

Ted Wai Wu, Asst. U.S. Atty., (argued), of Los Angeles, California for appellee.

Appeal from the United States District Court for the Central District of California.

Before ELY and GOODWIN, Circuit Judges, and SOLOMON,* District Judge.

*Honorable Gus J. Soloman, Senior District Judge for the District of Oregon, sitting by designation.

ELY, Circuit Judge:

Edler Industries, Incorporated, and Vernon Edler appeal from their convictions for exporting, without a license, technical data relating to articles on the United States Munitions List. 22 U.S.C. & 1934 (1970) (repealed 1976); see note 1 infra. Edler Industries was sentenced to pay a fine of $45,000. Vernon Edler received a two-year sentence, suspended on the condition that he serve ten weekends in a jail-type institution, remain on probation for five years, and donate 1200 hours of work to a charitable organization.

I.

Most of the facts are not seriously disputed. About 1950 Edler Industries began in Newport Beach, California, as a small machine shop and gradually evolved into a manufacturing and engineering firm in the aerospace in-

dustry. Vernon Edler, the founder and president of the corporation, guided the business affairs of the firm and had frequent contacts with its engineers and technicians. The corporation acquired expertise in tape wrappings, a process for creating durable lightweight materials by wrapping specially impregnated cloth around a form, further impregnating it with other materials, and curing it under pressure and heat. It also developed a capacity to produce carbon/carbon composites through application of some of the same techniques. Both types of materials have important applications for rocket and missile components, particularly in nozzles. Their light weight is valuable, and they are ablative, wearing away under the pressure and heat of the rocket exhaust at a predictable rate. Edler Industries worked on the Polaris and other government missile programs; conse-

quently, its officers and employees were familiar with missile components.

The technicians utilized by Edler Industries do not constitute classified information, an they have various civilian uses. Carbon/carbon technology is, for example, utilized in the manufacture of golf club shafts.

French missile companies eager to master this technology first contacted Edler Industries in 1968. Edler and the Societe d'Etude de la Propulsion par Reaction negotiated an agreement for a technical assistance program. Edler then sought approval from the Office of Munition Control of the State Department (OMC). OMC denied the request, but Edler nevertheless continued to provide assistance.

In January 1974 Edler Industries reached an agreement with a second French firm, the Societe Europeene de Propulsion (SEP), for

the provision of technical assistance and data related to a tape wrapping program. In March 1974 Edler executed a similar agreement with SEP for carbon/carbon materials. SEP engineers visited Edler's Newport Beach plant and Edler employees toured SEP's missile and rocket plant in Bordeaux. Edler filed applications with OMC for licenses covering the two programs, stating that the agreements would not become effective without OMC approval. OMC again rejected the requests in October 1974 on the basis that the exportation of this particular technical knowledge contravened United States policy. Edler, despite its prior representation, began implementing the programs shortly after the execution of the agreements. By the time OMC issued its disapproval, the tape wrapping program was completed, and, in spite of OMC's action, Edler continued to fulfill its car-

bon/carbon agreement.

Employees of Edler Industries demonstrated to SEP the techniques they used and experimented with the application of those techniques to the different materials used by SEP in France. They observed and commented on the techniques employed by SEP. They produced sample pieces in configurations similar to those utilized in missiles but not specifically designed for any particular missile. SEP was engaged in the production of rockets, a fact known to Edler personnel. Only on one minor occasion was there any indication that SEP might use the information supplied by Edler for nonmilitary purposes. The witnesses at trial generally agreed that the technology furnished by Edler had direct missile applications.

II.

The Mutual Security Act of 1954 authorized the President to control the "export and import of arms, ammunition, and implements of war, including technical data relating thereto." 22 U.S.C. § 1934(a) 1970.[1] The President is expressly empowered to designate which articles, including relevant technical data, constitutes arms, ammunition, and implements of war. Id. Pursuant to this

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1. In full, section 1934(a) provides:

> The president is authorized to control, in furtherance of world peace and the security and foreign policy of the United States, the export and import of arms, ammunition, and implements of war, including technical data relating thereto, other than by a United States Government agency. The president is authorized to designate those articles which shall be considered as arms, ammunition, and implements of war, including technical data relating thereto, for the purpose of this section.

statute the Department of State has promulgated regulations to restrict the international traffic in arms. See 22 C.F.R. §§ 121-130 (1977). One of the regulatory requirements is that an exporter of arms first obtain a license for exportation from the State Department. Id. §§ 123.01, 125.04, 125.05.

22 C.F.R. § 125.01 (1977) provides a three part definition for the term "technical data." The only portion that is relevant here provides:

> "[T]echnical data" means: (a) Any classified information that can be used, in the design, production, manufacture, repair, overhaul, processing, engineering, development, operation, maintenance, or reconstruction of arms, ammunition, and implements of war on the U.S. Munitions List.

Invoking the First Amendment, appellants emphasize the great potential breadth of the definition. The basic principles of the diesel engine, for example, constitute unclassified information that can be used in the man-

facture of military trucks, which are included in category VII(d) of the U.S. Munitions List. Id. § 121.01

Export controls regulate the transmission of unclassified information by mail, hand carriage, participation in foreign symposia, and domestic plant visits. Id. § 125.03. An exemption to the license requirement exists for published unclassified technical data, provided the exporter follows prescribed procedures. The person seeking publication, however, has the burden of obtaining governmental approval prior to publication. Id. § 125.11(a) n. 3; see United States v. Van Hee, 531 F.2d 352, 356 (6th cir. 1976). In the context of the regulatory framework, an expansive interpretation of technical data relating to items on the Munitions List could seriously impede scientific research and publishing and the inter-

national scientific exchange.

III.

The First Amendment protects at least some transmissions of information in a commercial context. See Bates v. State Bar, 443 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 43 L.Ed.2d 346 (1976); Bieglow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); Pittsburg Press Co. v. Pittsburg Comm'n on Human Rights, 413 U.S. 376, 93 S.Ct 2553, 37 L.Ed.2d 669 (1973). The contours of freedom of speech in

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In 1976 Congress repealed section 1934 replacing it with 22 U.S.C. § 2778 (1976) (enacted as Act of June 30, 1976, Publ. No. 94-329, § 212(b)(1), 90 Stat. 745). Section 1934 was therefore in effect when Edler Industries and SEP made the agreement in question.

the commercial realm are highly unsettled. See, e. g., Meiklejohn, Commercial Speech and the First Amendment, 13 Cal.W. L. Rev. 430 (1977). Rotunda, Commercial Speech Doctrine in the Supreme Court. 1976 U.Ill.L.F. 1080; Schiro, Commercial Speech; The Demise of a Chimera, 1976 Sup.Ct.Rev. 45; Comment, The Constitutional Status of Commercial Expression, 3 Hastings Const. L.Q. 761 (1976); Note, 11 Ga.L.Rev. 230 (1976). Edler has advanced a colorable claim that the First Amendment furnishes a degree of protection for its dissemination of technological information. We deem it unnecessary in this case to resolve the precise scope of that protection. Assuming the full applicability of the First Amendment, invalidation of the federal controls on munitions is unwarranted because of the narrow statutory construction that we adopt.

Recognition that Edler may have constitutionally protected expression does not by itself define the extent of that protection. By regulating conduct, the Government may pursue its legitimate objectives even though incidental limitations upon expression may result.

[G]eneral regulatory statues, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Knigisburn v. State Bar, 366 U.S. 36, 50-51 81 S.Ct 997, 1997, 6 L.Ed. 2d 105

(1961).

The federal government undeniably possesses the power to regulate in international arms traffic. The President, under section 1934, has the authority to act for the United States in this respect. As a necessary incident to the power to control arms export, the President is empowered to control the flow of information concerning the production and use of arms. The authority to regulate arms traffic would be of negligible practical value if it encompassed only the exportation of particular military equipment but not the exportation of blueprints specifying the construction of the very same equipment.

A strict test applies when legislation, though directed toward the regulation of conduct, also restricts expression. Whenever government regulation impinges upon freedom of speech, "the power to regulate must be so

exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Cantwell v. Connecticut, 310 U.S. 296, 304, 60 S.Ct 900, 903, 84 L.Ed. 1213 (1940); see United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). It is for this reason that, when reviewing alleged First Amendment violations, courts have refused to countenance overly broad statutes. See, e.g., Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.3d 629 (1967).

[1,2] As we have indicated, section 1934 and the definition of technical data are susceptible of an overbroad interpretation. Their expansive language may be construed to restrict not only the export of arms and information directly leading to the produc-

tion of articles on the Munitions List, but also the interchange of scientific and technical information that of itself is without any substantial military application. A broad statutory reading, however, is neither necessary nor proper. In our opinion, technical data must relate in a significant fashion to some item on the Munitions List. Moreover, adequate notice to the potential exporter requires that the relationship be clear. The Senate Committee on Foreign Relations described section 1934 as allowing control of munitions, "including relevant technical data." S.Rep. No. 1799, 83d Cong., 2d Sess.------, reprinted in [1954[U.S. Code Cong. & Admin. News, pp. 3175, 3244. Presumably, Congress intended that the technical data subject to control would be directly relevant to the production of a specified article on the Munitions List, now simply

vaguely useful for the manufacture of arms.

A careful reading of the regulations also suggests that the broad definition of technical data contained in 22 C.F.R. § 125.01 is not to be taken literally. The exemptions from licensing listed in 22 C.F.R. § 125.11 (1977) are specific, referring to items such as training manuals, firearms of less than .50 caliber, and editorial revisions of technical data previously approved for export.

In addition, we note that the successor statute to the Mutual Security Act of 1954 evinces a congressional intent to delineate narrowly the scope of information subject to arms controls. The replacement for section 1934, 22 U.S.C. § 2778 (1976) provides for presidential control of "defense articles and defense services." Id §2278(a)(1). Although the President retains the authority to desig-

nate what information constitutes defense services for the purpose of section 2778, id §§ 2778(a)(1), 2794(7), the act supplies a fairly narrow definition of defense services for the remaining provisions. Under 22 U.S.C. § 2794(4) (1976) defense services include technical assistance and "defense information. . . used for the purposes of making military sales." The term "defense information" refers in part to items such as documents, plans, or protetypes that relate to specified defense articles. Id. § 2403(e).

The sole appellate case dealing with technical data under section 1934 lends some support to our narrow interpretation of the term. In United States v. Van Hee, 531 F.2d 352 (6th Cir. 1976), the defendant exported information to Portugal for the production of an armored amphibious military vehicle

essentially identical to one manufactured in the United States. The Department of State had denied an export license for the vehicle. The Sixth Circuit held that the exported information, which consisted of blueprints and the technical expertise of Americans who travelled to Portugla, constituted technical data for which an export license was required. Id. at 356-57. While noting the broad regulatory definition of technical data, the court emphasized the close connection between the data and the amphibious vehicle, an article designated in the Munitions List. Id. at 356.

[3] We conclude, therefore, that section 1934 and the accompanying regulations prohibits only the exportation of technical data significantly and directly related to specific articles on the Munitions List. The prohibition includes the provision of tech-

nical assistance for the foreign manufacture of articles that, if manufactured domestically, would be on the Munitions List. If the information could have both peaceful and military application, as Edler contends that its technology does, the defendant must know or have reason to know that its information is intended for the prohibited use. Cf. Gorin v. United States, 312 U.S. 19, 27-28, 61 S.Ct. 429, 85 L.Ed. 488 (1941) (scienter requirements shelters Espionage Act, ch. 30, §§ 1, 2, 40 Stat. 217 (1917) (current version at 18 U.S.C. & 793 (1976), from the impermissible vagueness). These limitations are necessary both to adhere to the purpose of the Act and to avoid serious interference with the interchange of scientific and technological information.

[4] As construed, section 1934 and the regulations do not interfere with constitu-

tionally protected speech. Rather, they control the conduct of assisting foreign enterprises to obtain military equipment and related technical expertise. So confined, the statue and regulations are not overbroad. For the same reasons the licensing provisions of the Act are not an unconstitutional prior restraint on speech.

[5] One additional First Amendment argument is presented. This is that the Government may not constitutionally prohibit the exportation of Edler's technology because that technology is widely distributed in the United States. The District Court properly rejected Edler's position. Given the unquestionable legitimacy of the national interest in restricting the dissemination of military information, the claim of public availability in the United States if not a defense recognized by the Constitution. Cf. Zemel v.

Ruck, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1956) (Government may prevent person from travelling to particular country). The State Department regulations, we should note, do grant a public availability defense, subject to certain conditions. Technical data is exempt from the export license requirements if it is both published and available to the general public. 22 C.F.R. § 125.11(a) (1977). To claim such an exemption an exporter must comply with the certification standards contained in 22 C.F.R. § 125.22 (1977). See United States v. Van Hee, supra, 531 F.2d at 356.

[6] While, under the facts present here, the trial court correctly refused to recognize appellants' public availability defense, the court did not have the benefit of our interpretation of technical data. It rejected a second defense raised at trial by

both appellants, which was that the information furnished by Edler Industries had a number of nonmilitary uses. We believe evidence concerning nonmilitary applications is relevant to the question of scienter, i.e., whether a defendant knew or should have known that the recipient of the exported information would use the information to produce or operate Munitions List articles.

The District Court also refused to permit the defense to develop the proposition that the assistance given to SEP would not, of itself, suffice for the manufacture of rocket nozzle components. Any information that would in any way help in a process that led to the final product, the court stated, came under the definition of technical data. Such a reading of the statute and regulations is far too broad, as such evidence bears on the significance of the relation-

ship between information and Munitions List items.

Accordingly, because the case was tried on an incorrect interpretation of the scope of section 1934 and the pertinent regulations, the judgments of conviction are reversed and the cause is remanded for a new trial consistent with this option.[2]

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2. The procedural due process claims raised by Edler are without merit. The notice of disapproval from OMC was not arbitrary, but was founded on a policy of only selling missile equipment and keeping missile technology in the United States. Moreover, Edler Indurtries did not seek administrative review under 22 C.F.R. § 123.05(c) (1977) or a hardship exception under 22 C.F.R. 126.10 (1977), not did it seek judicial review under the Administrative Procedure Act, 5 U.S.C. § 702 (1976).

TITLE 22--FOREIGN RELATIONS

Chapter 1--Department of State

SUBCHAPTER M--INTERNATIONAL TRAFFIC IN ARMS

PART 121--ARMS, AMMUNITION, AND IMPLEMENTS OF WAR

Enumeration of Articles

Enumeration of Articles

§121.01 The U.S. munitions list.

Pursuant to the authority cited supra the following articles[1] are hereby designated as arms, ammunition, and implements of war.

Category IV--LAUNCH VEHICLES GUIDED MISSILES, BALLISTIC MISSILES, ROCKETS, TORPEDOES, BOMBS, AND MINES.

*(a) Rockets (except meteorolgical sounding rockets), bombs, grenades, torpedoes, depth charges, land and naval mines, and demolition blocks and blasting caps

(see § 121.05)

*(b) Launch vehicles, guided missiles and ballistic missiles, tactical and strategic.

*(c) Apparatus, devices, and materials for the handling, control, activation, detection, protection, discharge, or detonation of the articles in paragraphs (a) and (b) of this category (see §121.06).

*(d) Missile and space vehicle power plants.

*(e) Military explosive excavation devices.

(f) Ablative materials fabricated or semi-fabricated from advanced composites (e.g., silica, graphite, carbon, and boron filaments) for the articles in this category when clearly identifiable as arms, ammunition, and implements of war, including the

tape wrapping and other techniques for their production.

(g) All specifically designed components, parts, accessories, attachments, and associated equipment for the articles in this category.

§124.01 Manufacturing license and technical assistance agreements

Proposed agreements and proposed amendments to existing agreements between persons in the United States and persons in foreign countries, private or governmental, for (a) the manufacture abroad (i.e., whereby an American person grants a foreign person a legal right or license to manufacture abroad) or (b) the furnishing abroad of technical assistance (i.e., the performance of functions and/or the conveyance of information involving the disclosure of technical data, as opposed to granting a right to license to

manufacture) relating to arms, ammunition, and implements of war on the U.S. Munitions List, shall be submitted by letter to the Office of Munitions Control, Department of State, for approval from the standpoint of world peace, U.S. foreign policy and the security of the United States. Proposed agreements (or amendments thereto) shall not take effect until Department of State approval has been obtained. (Sales representation agreements are not subject to Department of State approval.)

PART 125--UNCLASSIFIED TECHNICAL DATA AND CLASSIFIED INFORMATION DATA AND EQUIPMENT

Sec.

125.01 Technical Data
125.02 Classified information.
125.03 Export of technical data.
125.04 Export of unclassified technical data.
125.05 Export of classified information (data and equipment).

Exemptions

125.10 Shipments by U.S. Government agencies.
125.11 General exemptions.
125.12 Canadian shipments.
125.13 Data on nuclear materials.

Procedures

125.20 Export of unclassified technical data.
125.21 Export of classified information (data and equipment).
125.22 Certification requirements.
125.23 Filling of licenses for export of unclassified technical data.
125.24 Filling of licenses for export of classified information (data and equipment).

Authority: The provisions of the Part 125 issued under sec. 414, as amended, 68 Stat, 848; 22 U.S.C. 1934; secs. 101 and 105, E.O. 10973, 26 F.R. 10409; sec. 6, Department Delegation of Authority No. 104, 26 F.R. 10608, as amended, 27 F.R. 9925, 28 F.R. 7231; and Redelegation of Authority No. 104-3-A, 28 F.R. 7231.

Note: Export licenses for technical data may be denied, revoked, suspended, or

amended by the Department of State. (See § 123.05 of this subchapter.)

§125.01

As used in this subchapter the term "technical data" means: (a) Any unclassified information that can be used, or be adapted for use, in the design, production, manufacture, repair, overhaul, processing, engineering, development, operation, maintenance, or reconstruction of arms, ammunition, and implements of war on the U.S. Munitions List; or (b) any technology which advances the state-of-the-art or establishes a new art in an area of significant military applicability in the United States;[1] or (c) classified information as defined in §125.02.

§125.03 Export of technical data.

The export controls of this subchapter over technical data (a) apply to the export of unclassifed technical data relating to

arms, ammunition, and implements of war on the U.S. Munitions List, and (b) classified equipment and classified information relating to arms, ammunition, and implements of war on the U.S. Munitions List and defined in §125.02. These controls shall apply whenever the information is to be exported by oral, visual, or documentary means. Therefore, an export occurs whenever technical data is, inter alia, mailed or shipped outside the United States, carried by hand outside the United States, disclosed through visits abroad by American citizens (including participation in briefings and symposia), and disclosed to foreign nationals[2] in the United States (including plant visits and participation in briefings and symposia). A license to export technical data shall not be used for foreign production purposes, or for technical assistance in such production

without the specific approval of the Department of State.

PART 127--VIOLATIONS AND PENALTIES

Sec.

127.01 Violations in general
127.02 Misrepresentation and concealment of facts.
127.03 Penalties for violation.
127.04 Penalties for violations relating to Southern Rhodesia.
127.05 Authority of district directors of customs.
127.06 Seizure and forfeiture in attempts at illegal exports.

Authority: The provisions of the Part 127 issued under sec. 414, as amended, 68 Stat. 848; 22 U.S.C. 1934; 18 U.S.C. 1001; 22 U.S.C. 401; secs, 101 and 105, E.O. 10973, 26 F.R. 10469; sec 6, Departmental Delegation of Authority No. 104, 26 F.R. 1068, as amended, 27 F.R. 9925, 28 F.R. 7231; and Redelegation of Authority No. 104-3-A, 28 F.R. 7231. The provisions of Part 127 regarding exports to Southern Rhodesia, issued under

E.O. 11322, 32 F.R. 119: 59 Stat. 620, 22 U.S.C. 287c.

§127.01 Violations in general.

It shall be unlawful for any person to export or attempt to export from the United States any of those articles on the U.S. Munitions List without first having obtained a license therefore, unless written approval was obtained from the Department of State or an exemption from this requirement is authorized by this subchapter.

§127.03 Penalties for violations.

Any person who willfully violates any provision of section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934), or any rule or regulation issued under that section, or who willfully, in a registration or license application, makes any untrue statement of a material fact or omtis to state a material fact required to be stated

therein or necessary to make the statements therein not misleading, shall, upon conviction be fined not more than $25,000, or imprisoned not more than 2 years or both.